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INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

VII. PRICING OF GOODS

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[Editorial note: The present draft chapter VII is a revision of draft chapter VI, "Pricing of goods", published as document A/CN.9/332/Add.5. The note in square brackets at the beginning of each paragraph indicates either the number under which the paragraph appeared in document A/CN.9/332/Add.5 or that the paragraph is new. The revisions of paragraphs that appeared in document A/CN.9/332/Add.5 are underlined.]

A. General remarks

1. [1] It is advisable that the parties specify in the countertrade agreement the price of the goods that will be the subject-matter of the future supply contract. When the parties are not able to set the price in the countertrade agreement, it is advisable to provide a method according to which the price will be determined at the time the supply contract is to be concluded. When contracts are to be concluded in both directions, methods for price determination may be agreed for contracts in each of the two directions. This chapter deals with methods for determining the price after the countertrade agreement has been concluded. It also deals with certain questions encountered in the specific contexts of supplying services and the transfer of technology. In addition, the chapter discusses the currency in which the price is expressed and revision of price.

2. [2] The parties may need to defer setting the price, for example, because the specific type of goods has not been identified at the time of the conclusion of the countertrade agreement or because there is to be a long interval between the conclusion of the countertrade agreement and the conclusion of a given supply contract. Such an interval may prompt the parties to defer setting the price because of the possibility of price fluctuation or of a change in the underlying economic conditions during the interval. In some cases, the parties may set the price of an initial shipment, but leave the determination of the price of subsequent shipments for a later time. Providing a method for determining the price may help the parties avoid differences over what the appropriate price should be, which may delay or prevent the conclusion of supply contracts. Such differences may be compounded when a party expects a supply contract in one direction not to be profitable and wishes to offset the expected loss in setting the price for the contract in the other direction.

3. [3] In a barter transaction, it may not be necessary to include a provision on price because the goods shipped in one direction constitute payment for the goods shipped in the other direction. Nevertheless, pricing issues may arise in a barter transaction if the parties decide to measure the relative value of their shipments in monetary terms, rather than merely in terms of volume and quality, or if the shipments are of different values and the imbalance is to be settled in money. Pricing would also be necessary when customs regulations require that goods entering a country indicate a monetary value.

4. [4] In setting the price of the countertrade goods, it is advisable that the parties specify whether or not the price includes costs ancillary to the costs of the goods themselves, such as transportation or insurance, testing, or customs duties and taxes. Some of the elements of the price may

be indicated by using an appropriate trade term such as those defined in INCOTERMS 1990 of the International Chamber of Commerce.

5. [5] The parties may wish to stipulate the point of time when the price is to be calculated, particularly in the case of goods whose price may fluctuate. When the countertrade transaction involves a single shipment or a number of shipments within a relatively short period of time, and the price is to be determined only once, a specified date may be agreed upon. In some cases, the price setting mechanism may be set in motion by an event such as the start-up of a plant under a buy-back transaction or the placing of an order. When multiple shipments are spread out over a longer period of time, several dates for determination of price may be agreed upon or the countertrade agreement may provide a mechanism for revision of the initial price.

6. [6] The parties should bear in mind that there may be mandatory rules that affect the level at which the price may be set. For example, if the price is set at a low level in relation to the market price, the goods may be subject to anti-dumping import duty.

B. Currency of price

7. [7] The currency in which the price is to be paid may involve certain risks arising from the fluctuation in exchange rates between that currency and other currencies. If the price is to be paid in the currency of the supplier's country, the purchaser bears the consequences of a change in the exchange rate between that currency and the currency of the purchaser's country. The supplier, however, will bear the consequences of a change in the exchange rate between the currency of the supplier's country and the currency of another country in which the supplier has to pay for equipment, materials or services needed in the production of the goods. If the price is to be paid in the currency of the purchaser's country, the supplier bears the consequences of a change in the exchange rate between this currency and the currency of the supplier's country. If the price is to be paid in the currency of a third country, each party bears the consequences of a change in the exchange rate between this currency and the currency of its respective country. Where a financing institution has granted the purchaser a loan for the purchase of the goods, the purchaser may prefer the price to be paid in the currency in which the loan is granted.

8. [8] In stipulating the currency in which the price is to be paid, the parties should take into consideration foreign exchange regulations and international treaties in force in the countries of the supplier and the purchaser, which may mandatorily govern this question. The parties should also take into account that under some legal systems the price in an international contract must be paid in the currency in which it is denominated, while other legal systems may permit, or even require, payments in the currency of the place of payment, even if the price is denominated in a convertible currency.

9. [9] The countertrade agreement may denominate the price in a currency that the parties consider to be stable or in a unit of account that is not a national currency, but provide that it is to be paid in another currency. The effects of such an approach are similar to those achieved by a currency clause

(see below, paragraphs 48 to 50), and restrictions imposed by the applicable law in respect of currency clauses may also apply to such provisions. If this approach is used, it is advisable to agree in the countertrade agreement that the exchange rate is to be the one prevailing at a specified place on a specified date.

10. [10] It is not advisable for the contract to denominate the entire price in two or more currencies, and allow either the debtor or the creditor to decide in which currency the price is to be paid. Under such a clause, only the party having the choice is protected, and the choice may bring the party having the choice unjustified gains.

C. Determining price after conclusion of countertrade agreement

1. Standards

11. [11] The countertrade agreement may provide for a determination of the price through the use of a standard (see chapter IV, "Countertrade commitment", paragraph 44). Such a method provides a price at the time of the conclusion of the supply contract in an objective manner not influenced by the will of the parties.

12. [12] The parties may wish to include a procedure to apply in the event a standard they select proves to be unworkable (e.g., because a market price is not available as expected). For example, the parties may provide that the price is to be determined through the use of an alternate standard or that the price is to be determined by a third person.

(a) Market prices for goods or services of standard quality [title modified]

13. [13] When goods identified in the countertrade agreement are commodities or semi-finished products (e.g., grains, oil, metals, wool) for which prices are regularly reported, the parties may agree to link the price of the countertrade goods to the reported price. Such a linkage to a standard price can also be used for determining the price of services if the service is standard and if there exists a reported price for the service. Such standard services may be, for example, transport; harvesting, cleaning, sorting or packing certain types of goods; or painting of standard surfaces such as ships. Where the price of goods or services is quoted in several markets, the parties are advised to specify a particular market or exchange to which reference will be made. In order to protect against price fluctuations, the standard may call for an average of the prices reported at several agreed points of time (e.g., the prices reported on the first business day of the month for the six months preceding the date of the determination of the price).

(b) Production cost

14. [14] The parties may agree that the price is to be based on the supplier's cost of producing the goods, plus an amount to cover the supplier's overhead and profit. Such an approach may be selected when the exact cost of various inputs cannot be anticipated at the time the countertrade agreement is concluded. In order to limit the purchaser's risk of having to pay an excessive price, it is advisable that, where possible, the parties stipulate

in the countertrade agreement the quantity of inputs (e.g., raw materials, energy and labour) that will be required for the production of one unit of the goods. The parties may also wish to stipulate that the supplier should maintain records reflecting production costs in accordance with forms and procedures required by the purchaser, and that the purchaser shall have access to those records. This approach might be used when the contract to be concluded involves a technological solution that has not been fully developed yet and the exact cost of its development cannot be foreseen.

(c) Competitor's price

15. [15] The price may be determined on the basis of the price charged by an identified competitor producing the same type of goods as those that will be delivered under the supply contract. If the countertrade agreement does not identify the competitor, it may establish criteria for the selection of a competitor (e.g., geographical criteria or criteria related to the volume of production of the same type of goods). Because the competitor may sell a product at different prices in different geographical regions and markets, it is advisable that the countertrade agreement identify the market to which reference will be made. The price clause could also indicate how the price information will be obtained and the date as of which the competitor's price is to be determined. Furthermore, the parties may agree to exclude specially discounted prices charged to certain customers (preferential prices). For example, the standard may exclude prices charged for the goods when they are purchased by disaster relief organizations or by employees of the supplier.

16. [16] A competitor's price may not be relevant, without adjustments, if it is based on a significantly larger or smaller quantity than the quantity intended to be purchased under the countertrade agreement. A competitor's price may also not be appropriate if the competitor's goods are of a different quality, if the competitor's price is based on payment conditions (e.g., deferred payment) not being offered by the supplier of the countertrade goods, or if the amount of transportation costs or insurance and public charges contained in the competitor's price differs from what is to be included in the price of the countertrade goods. It is therefore advisable to stipulate that the standard should take into account only prices for shipments that are comparable in quantity, quality, delivery and payment conditions to the future supply contract, or that amounts should be added to or subtracted from the competitor's price in order to compensate for differences.

17. [17] The parties may agree that the price is to be determined on the basis of several competitors' prices. Such a clause may identify the competitors or it may provide that each of the parties is to obtain quotations from a specified number of competitors. If the competitors are not identified, it is advisable that a clause of this type specify the countries or regions from which the parties are to obtain the quotations. It is also advisable that the countertrade agreement indicate the manner in which the price is to be calculated (e.g., whether by calculating a mean or a median price). The parties may wish to specify the period of time during which the quotations are to be obtained. In doing so, the parties should take into account the length of time necessary to obtain the quotations as well as the need to base the calculation on current prices.

18. [18] When the party committed to purchase goods manufactures the same type of goods, the parties may agree that the price will be determined on the

basis of the price charged by the purchaser or on the basis of the purchaser's own cost of manufacture. Such an approach might be used, for example, in a buy-back transaction in which a producer of a certain type of goods sells a facility that produces that type of goods and agrees to buy back the resultant products.

(d) Most-favoured-customer clause

19. [19] It may be agreed that the price of the countertrade goods will be based on the lowest price at which goods of the same type are supplied by the supplier to other customers. In some cases, the parties may restrict the clause to a limited category of customers (e.g., customers in a particular country or customers identified in the countertrade agreement). The parties may wish to indicate the means to be used to identify the most-favoured customer. For example, the supplier could be required to provide specified types of information indicating the prices charged by the supplier to other customers. It is also advisable to ensure that the most-favoured-customer price is relevant to the shipments to be made pursuant to the countertrade agreement (see above, paragraph 16). The parties may also wish to specify the date as of which the most-favoured-customer price is to be determined. The parties may wish to specify any specially discounted prices (preferential prices) offered by the supplier to certain customers that should not be taken into account (see above, paragraph 15). The scope of the most-favoured-customer clause may be broadened by agreeing that the price will be determined on the basis of the lowest price charged by the supplier or by other specified suppliers of the same type of goods.

(e) Use of more than one standard

20. [20] The countertrade agreement may provide that the price is to be determined by a formula involving two or more standards. For example, the price may be determined by averaging the prices derived from the selected standards. Another possibility is for the price derived from a particular standard to be compared with prices derived from one or more other standards. If the difference between the price derived from the selected standard and the prices from the comparator standards does not reach a specified threshold, the price derived from the selected standard would apply. If the difference exceeds a specified threshold, the final price would be, for example, the average of the price derived from the standards. Such techniques may be useful when it is desired to avoid the possibility that the price derived through the use of a single standard might not reflect the market value of a given product at the time the purchase is to be made.

2. Negotiation

21. [21] The parties may stipulate in the countertrade agreement that the price to be paid under the future supply contract will be negotiated at a time subsequent to the conclusion of the countertrade agreement. It is advisable that, to the degree possible, the parties agree on guidelines for the determination of the price. (For a discussion on procedures for the negotiations, and on guidelines for the determination of the price, see chapter IV, "Countertrade commitment", paragraphs 44 to 46, and 57 to 60).

22. [22] Guidelines for the determination of the price may establish minimum and maximum limits within which the price is to be negotiated. In

establishing such limits, the parties may use price standards of the type described above in paragraphs 11 to 20. For example, it may be agreed that the price should not be more than 5 per cent higher or more than 5 per cent lower than the price charged by a competitor.

23. [23] Alternatively, guidelines may merely provide a reference price to be taken into account in negotiations. In formulating a guideline of this type, the parties may use price standards such as those described above in paragraphs 11 to 20. For example, it may be agreed that the price will be negotiated taking into account the price of a particular competitor.

24. [24] A negotiation guideline may also take the form of a statement that the price of goods is to be "competitive", "reasonable", or at a "world market" level. Such a clause might be acceptable when the goods are of a standard quality. A guideline of this type may be made more precise by specifying, for example, whether the price should be based only on prices paid to the supplier by other buyers or should also be based on prices charged by other suppliers, the period of time the parties should refer to in determining what is a "competitive", "reasonable" or "world market" price, and, if there are variations in prices in different markets, which markets, types of buyers or geographical territories are referred to.

3. Determination of price by third person

25. [25] Sometimes the parties provide for the price to be set by an independent third person (e.g., a market specialist in the goods in question). For a discussion of determination of contract terms by third persons, see chapter IV, "Countertrade commitment", paragraphs 47 to 54. Such an approach may be used in combination with a clause on price setting by negotiation so that the determination of the price would be entrusted to a third person in the event that the parties failed to negotiate a price.

26. [26] The countertrade agreement should delimit the mandate of the third person by providing guidelines of the type discussed with respect to negotiation (above, paragraphs 21 to 24). The parties may wish to establish deadlines for referral of the matter to a third person, so that the price could be set in time to allow conclusion of contracts as planned.

4. Determination of price by one party

27. [27] Sometimes it is agreed that the price will be determined by one of the parties to the countertrade agreement. Utmost caution is advisable in agreeing on such a solution, since it leaves the determination of the price to a person who is interested in the outcome of the determination. In many legal systems an agreement of this type is not enforceable. (For further discussion, see chapter IV, "Countertrade commitment", paragraphs 55 and 56.)

D. Pricing of services

28. [new paragraph] When the parties determine in the countertrade agreement a service as the subject-matter of the future supply contract (e.g., maintenance, repair, transport, construction services), it is advisable for the parties to settle in the countertrade agreement, to the extent possible, certain questions relating to the price of the services. By doing so, the

parties may facilitate negotiations for the conclusion of the envisaged supply contract.

29. [new paragraph] Various approaches may be used in setting the price for services. One approach is to agree on unit rates for units of work processes involved. The units may be, for example, a quantity unit of the result (e.g., a square meter of paint work, kilometer of transport of goods, cubic meter of excavated material, hour of labour). This approach may be appropriate when the services in question are of a routine character or when the quantity of the services needed cannot be envisaged accurately at the time of entering into the countertrade agreement. If there is no provision for a revision of the unit price in the event of changes in unit costs, the risk of increases in costs and benefits arising out of decreases in costs are divided between the parties. The supplier bears the risk of an increase of the costs of materials and labour for each unit or receives the benefit of a decrease in those costs.

30. [new paragraph] Another approach is for the price to be expressed as a lump sum payable for the specified service. Under this method, the purchaser knows the total price of the service, and the supplier bears the risk of increases in the cost of the service and benefits if the cost turns out to be lower than anticipated. Since the lump-sum price may include an amount to compensate the supplier for bearing the risk of cost increases, the price may be higher in some cases than if the cost-reimbursable pricing method were used for the same service (see the following paragraph). In addition, the lump-sum pricing method requires a precise specification in the contract of the scope of the service. It might be advisable for the purchaser to address in the countertrade agreement the manner of monitoring the performance by the supplier to ensure that the contractor does not reduce its costs by using substandard materials or working methods.

31. [new paragraph] Yet another approach may be to stipulate that the supplier of the service is to be paid a fee to cover its overhead and profit, and that the supplier is to be compensated for its expenses on a cost-reimbursable basis. It is desirable for the countertrade agreement to specify clearly which costs are reimbursable and which are to be borne by the supplier out of its fees. Reimbursable expenses might be, for example, wages of personnel directly involved in the performance of the contract, routine items of materials or equipment used in performing the service, or costs incurred in employing specified types of subcontractors. Usually, the solution providing each party a better opportunity to foresee its costs is to enumerate the costs to be reimbursed and to provide that all other costs are to be borne by the supplier; sometimes, however, the parties decide to enumerate the costs that are not reimbursable and provide that all other reasonable costs are to be reimbursed.

E. Pricing of technology transfer

32. [new paragraph] Sometimes the countertrade agreement envisages the future conclusion of a supply contract that includes the transfer of technology (see chapter VI, "Type, quality and quantity of goods", paragraphs 16 to 23). In such cases, it is advisable for the parties, to the degree possible, to address in the countertrade agreement a variety of questions particular to the pricing of technology. Settling such questions in

the countertrade agreement may facilitate finalization of the supply contract involving the transfer of technology. Those questions, discussed in the following paragraphs, are analysed in publications dealing with transfer of technology generally. 1/

33. [new paragraph] The two principal forms of pricing of technology transfers are the lump-sum payment or payment of royalties. In the lump-sum method, the total price is determined at the outset. Among the key questions raised by this method are the time of payment and whether it is to be paid in one payment or in instalments. Under the law of some countries, the use of the lump-sum method may be subject to certain conditions. These conditions may, for example, restrict the types of transfers (e.g., purchase of patent rights or specified types of technical services and assistance) or sectors in which the lump-sum method may be used; they may also prescribe the basis on which the lump sum is be calculated and require a special governmental authorization.

34. [new paragraph] If the royalty method is used, the price payable (i.e., the royalty) is fixed by reference to some economic result of the use of the transferred technology. The law of some countries mandates the use of the royalty method of payment in certain types of industrial property licenses or technology transfer agreements). The royalty is typically linked to the production, sales, or profits arising from the use of the technology. Where the volume of production is used as the reference factor, the royalty may be determined, for instance, as a fixed amount per unit or quantity (e.g., per ton or per litre) produced. The law of some countries restricts the freedom of parties to agree on royalties based on production. For example, it may be required that for certain types of licenses or technology transfers royalties should be linked to sales volume.

35. [new paragraph] The linkage of royalties to sales has the advantage of not imposing on the transferee of the technology liability for payment of royalties for goods that have been produced but not sold. Parties wishing to use this approach must decide whether the royalty is to be based on the gross or on the net selling price. The latter method provides the possibility of excluding from the calculation of the royalty a number of items that are included in the sales price but which are unrelated to the technology or already have been a source of profit for the transferor. These might include, for example, packing expenses, taxes, transport and insurance costs, cost of raw-materials, and the percentage of the price covering the royalties. The law of some countries may define the permissible range of elements that may be included in the net selling price. Furthermore, the parties may wish to stipulate that the royalty is to be based on the fair market price of the product. Such an approach may be used to guard against a diminution in the level of the economic return achieved by the transferor that would result were the transferee to sell the products in question at a low price to a party with whom the transferee had a special relationship. Various methods exist in turn for defining the fair market price. Other questions raised by the linking of royalties to sales include the point of time when the product is deemed sold and the time when the remittance of the royalty becomes due.

36. [new paragraph] Another basis for the calculation of royalties is to link royalties to profits obtained by the transferee from the exploitation of the technology transferred. Other approaches to the calculation of royalties include minimum royalty arrangements, in which a minimum payment is due

irrespective of whether a given level of production, sales or profits has been achieved, decreasing royalty arrangements, in which the amount of the royalty decreases as production or sales increase, and maximum limits on the amount of royalties due. The use of certain of these arrangements may, in some cases, be mandated, and, in other cases, restricted, under the law of some countries. For example, in some countries, minimum royalty arrangements may not be permitted when royalties are linked to production, sales or profit, decreasing royalties might be mandated, and maximum royalty limits imposed for certain types of technology transfers. The attention of the parties should also be directed to the question of which of the parties is to be liable for payment of taxes on the royalties. It should be noted that the laws of some countries regulate this question (e.g., the parties may be required to stipulate in the contract for the transfer of technology who is to pay taxes).

37. [new paragraph] When considering whether to use the lump-sum or the royalty method, the parties should bear in mind, in addition to provisions of the applicable law, that each method of price calculation may have certain advantages and disadvantages in the light of the type of transaction and the economic circumstances involved. If, for example, royalties are payable over a long time, economic circumstances may change during this period affecting the volume of sales, and consequently the royalties payable; in a joint venture in which the transferor is a partner, it might be considered that a royalty linked to sales would be preferable to a lump-sum arrangement because of the added motivation provided to the transferor to develop sales. In some cases, it may be desirable to combine the two methods (e.g., an initial lump-sum payment followed by payment of royalties). The particular manner in which a royalty arrangement is structured would likewise have to reflect the economic circumstances and contractual obligations involved. For example, if the licensor or technology transferor is to assist in sales of the products resulting from the transfer of the technology, caution might be advisable in applying a decreasing royalties arrangement since such an arrangement might have the unintended effect of discouraging the transferor from expending fully its efforts in the direction of increasing sales. Where royalties are to be paid, the parties would typically agree on a method of reporting the variable data (e.g., volume of production, sales or profits) which serve as the basis for calculating the royalty. Provision is usually made for the transferee to keep certain records and for the transferor to be given an opportunity to review those records.

38. [new paragraph] In negotiating the technology pricing clause, the question might arise whether any separate fees should be payable for specific technical services and assistance to be provided by the transferor of technology. Such services and assistance may include, for example, training programmes for the personnel of a patent or trademark licensee, technical experts furnished by the licensor or transferor, various technical services relating to the purchase of capital goods, and management, planning, research and development services. Some countries have provisions relating to that question.

F. Revision of price

39. [28] When multiple shipments are spread out over a period of time, there may be a need to revise the price in order to reflect changes in the

underlying economic conditions. It may be agreed that a revision would occur at specified points of time. Those points of time should be coordinated with the schedule for the fulfilment of the countertrade commitment (e.g., the revision is to take place four weeks prior to the commencement of a subperiod).

40. [29] Under another approach, it may be agreed that a revision would take place in response to specified changes in underlying economic conditions (e.g., an exchange rate fluctuation beyond a certain percentage from a reference rate in effect on the date the countertrade agreement was concluded or changes beyond an agreed threshold in specified components of production cost such as raw materials or labour). Contractual provisions concerning price revision due to a change in the value of the currency in which the price is to be paid are mandatorily regulated under some legal systems. The parties should, therefore, examine whether a clause which they intend to include in the countertrade agreement is permitted under the law of the country of each party.

41. [30] Yet another approach is to provide for a price revision at regular intervals (e.g., every six months), as well as for unscheduled revisions in response to specified changes in underlying economic conditions. In order to limit the frequency of price revision, it could be agreed that an unscheduled review could not take place within a specified period of time following a review, or within a specified period of time preceding a scheduled review. Yet another approach would be to set the price revision procedure in motion upon the delivery of a specified portion of the total quantity of goods to be purchased.

42. [31] The countertrade agreement might provide for the price revision clause to apply only in cases where its application would result in a revision exceeding a certain percentage of the price.

43. [32] When the countertrade agreement contains a price revision clause, the parties may wish to specify the shipments to which the revised price is to apply. It may be agreed, for example, that the applicable price for a given shipment is the price in effect on the date the goods are ordered or on the date the letter of credit is issued.

1. Reapplication of price clause

44. [33] The parties may stipulate in the countertrade agreement that the price is to be revised through the use of the same method as was employed to determine the initial price (standards (paragraphs 11 to 20), negotiation (paragraphs 21 and 24), determination of price by a third person (paragraphs 25 and 26) or determination of price by one party (paragraph 27)).

2. Index clause

45. [34] The purpose of index clauses is to revise the price of the countertrade goods by linking the price to the levels of the prices of certain goods or services prevailing on a certain date. Usually the linkage is to the price of raw materials or services used in the production of the countertrade goods. A change in the agreed indices automatically effects a change in the price. In formulating an index clause, it is advisable to use an algebraic

formula to determine how changes in the specified indices are to be reflected in the price. Several indices, with different weightings given to each index, may be used in combination in the formula in order to reflect the proportion of different cost elements (e.g., materials or services) to the total cost of the goods. Different indices may be contained in a single formula to reflect the costs of different types of materials and services. When the sources of the same cost element (e.g., labour or energy) are in different countries, different indices may be found in a single formula for that cost element.

46. [35] Several factors may be relevant in deciding on the indices to be used. The indices should be readily available (e.g., they should be published at regular intervals). They should be reliable. Indices published by recognized bodies (such as chambers of commerce, or governmental or inter-governmental agencies), may be selected. The parties should exercise caution in using indices based on different currencies in a formula, as changes in the relationships between the currencies may affect the operation of the formula in unintended ways.

47. [36] In some countries, particularly in developing countries, the range of indices available for use in an index clause may be limited. If an index is not available for a particular element of costs, the parties may wish to use an available index in respect of another element. It is advisable to choose an element whose price is likely to fluctuate in approximately the same proportions and at the same times as the actual element to be used. For example, in cases where it is desired to provide an index for labour costs, a consumer price index or cost-of-living index is sometimes used if there is no wage index available.

3. Change in exchange rate of currency in which price is payable

(a) Currency clause

48. [37] Under a currency clause, the price to be paid is linked to an exchange rate between the currency in which the price is to be paid and a certain other currency (referred to as the "reference currency") determined at the time of entering into the countertrade agreement. If this rate of exchange has changed at the time of payment, the price to be paid is increased or decreased in such a way that the amount of the price in terms of the reference currency remains unchanged. For purposes of determining the applicable exchange rate, it may be desirable to adopt the time of actual payment, rather than the time when the payment falls due. If the latter time is adopted, the supplier may suffer a loss if the purchaser delays payment. Alternatively, the supplier may be given a choice between the exchange rate prevailing at the time when payment falls due or that prevailing at the time of actual payment. It is advisable to specify an exchange rate prevailing at a particular place.

49. [new paragraph] The intention of a currency clause is typically to stabilize the international purchasing power of the amount to be paid pursuant to the contract. Therefore, a currency clause may not operate as intended if the exchange rate between the currency in which the price is to be paid and the reference currency is set by administrative decisions independent of events taking place in the currency market.

50. [38] The reference currency should be stable. The insecurity arising from the potential instability of a single reference currency may be reduced by reference to several currencies. The contract may determine an arithmetic average of the exchange rates between the currency in which the price is payable and several other specified currencies, and provide for revision of the price in accordance with changes in this average.

(b) Unit-of-account clause

51. [39] If a unit-of-account clause is used, the price is denominated in a monetary unit of account composed of cumulative proportions of a number of selected currencies. In contrast to a clause in which several currencies are used (above, paragraph 50), the weighting given to each selected currency of which such a monetary unit of account is composed is usually not the same, and greater weight is given to currencies generally used in international trade. The unit of account may be one that is established by an intergovernmental institution or by agreement between two or more States and that specifies the selected currencies making up the unit and the relative weighting given to each currency (e.g., Special Drawing Right (SDR), European Currency Unit (ECU), or Unit of Account of the Preferential Trade Area for Eastern and Southern African States (UAPTA)). In choosing a unit of account, the parties should consider whether the relation between the currency in which the price is payable and the unit of account can be easily determined at the relevant times, i.e., at the time of entering into the supply contract and at the time of actual payment.

52. [40] The value of a unit of account composed of a basket of currencies is relatively stable, since the weakness of one currency of which the unit of account is composed is usually balanced by the strength of another currency. The use of such a unit of account will therefore give substantial protection against changes in exchange rates of the currency in which the price is payable in relation to other currencies.

Note

1/ The different methods of determining the price payable for technology are considered in detail in the Licensing Guide for Developing Countries (WIPO) and in Guidelines for Evaluation of Transfer of Technology (UNIDO); see footnote 1 in chapter VI, "Type, quality and quantity of goods".